Supreme Court, U. S.
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IN THE

SUPREME COURT of the UNITED STATES

October Term, 1979

No. 79-617

Muriel S. Smith

Plaintiff-Appellant

vs.

Rose Penta, Judge of Board of Elections, District One, Borough of Highlands;

Alynn Tracy Heck, Superintendant of Elections, County of Monmouth, State of New Jersey;

Ann Flynn, Monmouth County Board of Elections; State of New Jersey

Defendants-Respondents

JURISTITIONAL STATEMENT

WILLIAM E. WILSON
WILSON, ARGENTIERI & MC LEOD
107 Bay Avenue
Highlands, New Jersey 07732
Attorneys for Petitioners
Muriel S. Smith

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SUPREME COURT OF NEW JERSEY
Docket No. A-15 September Term 1978

MURIEL S. SMITH,

Plaintiff-Appellant,

v.

ROSE PENTA, Judge of Board of Elections, District One, Borough of Highlands; ALYNN TRACY HECK, Superintendant of Elections, County of Monmouth, State of New Jersey; ANN FLYNN, Monmouth County Board of Elections; STATE OF NEW JERSEY,

Defendants-Respondents.

JURISDICTIONAL STATEMENT

A. The opinion of the Supreme Court of New Jersey appealed from in this matter was delivered on July 19, 1979.

B. (i) This is an action in lieu of prerogative writs brought pursuant to Article 6, Section 5, Paragraph 4 of the Constitution of the State of New Jersey and R. 4:69-1, et seq., of the New Jersey Court Rules, challenging the validity of N.J.S.A. 19:23-45 of the New Jersey Election Law on both state and federal constitutional grounds.

(ii) This action was commenced on primary election day, June 7, 1977, seeking an Order To

Show Cause. That application was denied and an Order Denying Order To Show Cause was entered on that date in the Superior Court, Law Division. Plaintiff-Appellant appealed to the Superior Court, Appellate Division and an Order Affirming Decision Below was entered on June 7, 1977. A Petition for Certification was filed with the Supreme Court of New Jersey. Oral argument was heard on October 16, 1978 and an opinion was delivered on July 19, 1979 affirming the decisions below.

(iii) This appeal to the Supreme Court of the United States is filed pursuant to 28 U.S.C., Section 1257(2) in that it questions the validity of a New Jersey statute, i.e., N.J.S.A. 19:23-45, on the ground of its being repugnant to the Constitution and laws of the United States.

(iv) Cases which sustain jurisdiction are as follows:

(a) Rosario v. Rockefeller, 410 U.S. 752, 36 L. Ed 2d 1, 93 S. Ct. 1245 (1973);
(b) Reynolds v. Sims, 377 U.S. 533, 12 L. Ed. 2d 506, 84 S. Ct. 1362 (1964);
(c) Dunn v. Blumstein, 405 U.S. 330, 31 L. Ed. 2d 274, 92 S. Ct. 995 (1972);
(d) Fiske v. Kansas, 274 U.S. 380, 72 L. Ed. 1108, 47 S. Ct. 655 (1927).

(v) 19:23-45 Balloting regulations; political party affiliation declaration forms

No voter shall be allowed to vote at the primary election unless his name appears in the signature copy register.

A voter who votes in a primary election of a political party or who signs and files with the municipal clerk or the county commissioner of

registration a declaration that he desires to vote in the primary election of a political party shall be deemed to be a member of that party until he signs and files a declaration that he desires to vote in the primary election of another political party. The Secretary of State shall cause to be prepared political party affiliation declaration forms and shall provide such forms to the commissioners of registration of the several counties and to the clerks of the municipalities within such counties.

No voter, except a newly registered voter at the first primary at which he is eligible to vote, or a voter who has not previously voted in a primary election, may vote in a primary election of a political party unless he was deemed to be a member of that party on the fiftieth day next preceding such primary election.

A member of the county committee of a political party and a public official or public employee holding any office or public employment to which he has been elected or appointed as a member of a political party shall be deemed a member of such political party.

Any person voting in the primary ballot box of any political party in any primary election in contravention of the election law shall be guilty of a misdemeanor, and any person who aids or assists any such person in such violation by means of public proclamation or order, or by means of any public or private cooperation, shall likewise be guilty of a misdemeanor.

Amended by L. 1975, c. 260, § 1, eff. Dec. 12, 1975; L. 1976, c. 16, § 1, eff. April 8, 1976; L. 1977, c. 97, § 1, eff. May 20. 1977.

C. Statement of questions presented on this appeal:

(i) Is N.J.S.A. 19:23-45 violative of the Constitution of the United States in that it requires Plaintiff-Appellant and others similarly situated to declare their party affiliation fifty (50) days before the primary election and ten (10) days before the prospective candidates must file their petitions for nomination, thus, requiring the declaration to be made before the voters know who will be running for office, and effectively depriving them of the right to vote for the candidate of their choice?

(ii) Is N.J.S.A. 19:23-45 violative of the Constitution of the United States in that it creates two classes of voters, i.e., one class consisting of newly registered voters and voters who have never voted in a primary, and a second class of voters consisting of those who have voted in a primary, and imposes the requirement of filing a declaration of party affiliation only on the latter, thus, creating an invalid and discriminatory impediment to the exercise of their right to vote for the candidate of their choice?

D. Statement of the Case

The annual primary election was held on June 7, 1977. On that date Plaintiff-Appellant was a registered Republican in Election District One of the Borough of Highlands, County of Monmouth and State of New Jersey. As set out

supra N.J.S.A. 19:23-45 provides in part that any voter who has previously voted in a primary of one political party may not vote in the primary of another party unless a declaration of party affiliation is filed fifty days before the election.

However, N.J.S.A. 19:13-16 and N.J.S.A. 19:23-14 do not require prospective candidates to file their petitions until forty days before the primary. The Plaintiff-Appellant did not file the required declaration of party affiliation because on the fiftieth day preceding the primary all of the candidates on the local, county and state levels had not declared their candidacy. She was, therefore, unable to intelligently decide which party, candidate or candidates she wished to support and vote for in the primary election.

On June 7, 1977, primary election day, Plaintiff-Appellant attempted to vote in the Democratic primary and was refused the right to vote for having failed to file a declaration of party affiliation. This decision was initially made by the Defendant Rose Penta, Judge of the Board of Elections of District One in the Borough of Highlands. It was subsequently affirmed by Allyn Tracy Heck, Superintendant of Elections of the County of Monmouth, the office of Ann Flynn of the Monmouth County Board of Elections and the office of the Attorney General of the State of New Jersey.

Plaintiff-Appellant on that day, June 7, 1977, filed a Complaint in Lieu of Prerogative Writs in the Superior Court of New Jersey, Law Division. The Complaint was verified by the Affidavit of Plaintiff-Appellant. It was a nine

paragraph document and paragraph nine first raised the federal questions of denial of the right to vote without due process as guaranteed under the Constitution of the United States and the State of New Jersey and of discrimination against the class of voters of which Plaintiff-Appellant was a member, i.e., those voters who had previously voted in a primary.

Among the relief requested in the complaint was that the challenged portions of N.J.S.A. 19:45-23 be declared unconstitutional as a violation of due process and as being discriminatory in application. All of the Plaintiff-Applelant's prayers for relief were denied by the trial court and the Complaint was dismissed by an Order Denying Order To Show Cause dated June 7, 1977.

A Notice of Appeal was filed with the Superior Court, Appellate Division, and upon a motion to accelerate proceedings a hearing was had on June 7, 1977 before Panel F of that Division. The Defendants were represented by a Deputy Attorney General from the office of the Attorney General of the State of New Jersey. The Court considered the pleadings and heard oral argument of counsel. The action of the trial court was affirmed and on that same day, June 7, 1977 the Appellate Division entered an Order specifically declaring N.J.S.A 19:23-45 constitutional and dismissing the Complaint.

The federal questions were discussed in the briefs submitted to the Supreme Court of the State of New Jersey. The Court discussed these issues at pages 6 through 10 of its Opinion and concluded by saying, ''Rosario and Nader

make it abundantly clear that the New Jersey statute under attack suffers from no federal constitutional infirmity.''

It is from that aspect of the State Supreme Court's decision that this appeal is taken.

E. Statement of grounds for contention that this appeal presents substantial federal questions.

The statute challenged in this appeal places substantial limitations on the exercise of the right to vote. The right to vote does not encompass merely the ability to cast a ballot. The right to vote freely for the candidate of one's choice, without restrictions, is the essence of a democratic society. Reynolds v. Sims, 377 U.S. 533, 555; 12 L. Ed 2d 506; 84 S. Ct. 1362 (1964). Because of the critical importance of the vote any restrictions imposed by the State must be necessary to promote a compelling governmental interest. Dunn v. Blumstein, 405 U.S. 330, 342; 31 L. Ed 2d 274, 284 (1972).

If the State of New Jersey has not demonstrated that N.J.S.A. 19:23-45 serves a compelling state interest then the restrictions it places on Plaintiff-Appellant's right to vote violate her right to the franchise guaranteed by the First and Fourteenth Amendments. Dunn v. Blumstein, supra. The right to vote in a party primary is as protected as the right to vote in a general election. Bullock v. Canter, 405 U.S. 134 (1972).

The opinion of the Supreme Court of New Jersey has decided in favor of the validity of a statute which it is claimed violates the Plaintiff's constitutionally protected rights to

equal protection and due process. It has been held that a decision enforcing a state statute over the objection that to apply the statute to the facts of the case would violate the fourteenth amendment presents a federal question. Fiske v. Kansas, 274 U.S. 380, 71 L. Ed 1108, 47 S. Ct. 655 (1927).

Thus, this case is properly before the Court pursuant to 28 U.S.C., Section 1256(2).

Respectfully submitted,

WILSON, ARGENTIERE & MC LEOD

BY: WILLIAM E. WILSON

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APPENDIX

SUPREME COURT OF NEW JERSEY
A-15 September Term 1978

MURIEL S. SMITH,

Plaintiff-Appellant,

v.

ROSE PENTA, Judge of Board of Elections, District One, Borough of Highlands; ALYNN TRACY HECK, Superintendent of Elections, County of Monmouth, State of New Jersey; ANN FLYNN, Monmouth County Board of Elections; STATE OF NEW JERSEY,

Defendants-Respondents.

Argued October 16, 1978 Decided July 19, 1979

On Certification to Superior Court, Appellate Division.

Mr. William E. Wilson argued the cause for appellant.

Mr. Stephen Skillman argued the cause for respondents (Mr. John J. Degnan, Attorney General of New Jersey, attorney; Ms. Erminie L. Conley, Deputy Attorney General, of counsel; Mr. Nathan M. Edelstein, Deputy Attorney General, on the brief).

The opinion of the Court was delivered by MOUNTAIN, J.

A primary election was held June 7, 1977. On that day the plaintiff, a resident of the Borough of Highlands in Monmouth County and a registered Republican, sought to register as a Democrat in order that she might vote forthwith in that party's primary election. Her request to register was denied and she immediately filed a complaint and sought the issuance of an order to show cause why she should not be granted declaratory and injunctive relief. The trial judge dismissed the complaint and that same day the Appellate Division affirmed this ruling. We granted plaintiff's petition for certification, 76 N.J. 235 (1978), and now affirm.

The section of our Election Law with which we are here concerned, fixes certain of the requirements for voting in a primary election and reads as follows:

> No voter shall be allowed to vote at the primary election unless his name appears in the signature copy register.
> A voter who votes in a primary election of a political party or who signs and files with the municipal clerk or the county commissioner of registration a declaration that he desires to vote in the primary election of a political party shall be deemed to be a member of that party until he signs and files a declaration that he desires to vote in the primary election of another political party at which time he shall be deemed to be a member of such other political party. The Secretary of State shall cause to be prepared political party affiliation declaration forms and shall provide such forms to the commissioners of registration of the several counties and to

the clerks of the municipalities within such counties.

No voter, except a newly registered voter at the first primary at which he is eligible to vote, or a voter who has not previously voted in a primary election, may vote in a primary election of a political party unless he was deemed to be a member of that party on the fiftieth day next preceding such primary election.

A member of the county committee of a political party and a public official or public employee holding any office or public employment to which he has been elected or appointed as a member of a political party shall be deemed a member of such political party.

Any person voting in the primary ballot box of any political party in any primary election in contravention of the election law shall be guilty of a misdemeanor, and any person who aids or assists any such person in such violation by means of public proclamation or order, or by means of any public or private direction or suggestions, or by means of any help or assistance or cooperation, shall likewise be guilty of a misdemeanor. (N.J.S.A. 19:23-45)

Implementation of the balloting regulations set forth in this statute results in a nominating procedure which is widely regarded as a "closed" primary. Where such an election scheme prevails--as it does, in some form, in

the great majority of states [1] -- only those who quality as members of a particular political party may vote in that party's primary election. Except as noted, New Jersey has always adhered to the closed primary system [2]

As this Court has observed,

> New Jersey has been described as "one of the most tightly closed of the closed primary states." Merriam and Overacher, Primary Elections, 71 (1928). (Stevenson v. Gilfert, 13 N.J. 496, 499 (1953))[3]

A closed primary system generally includes, as is true in New Jersey, some kind of affiliation requirement designed to exclude certain types of voters.

> Affiliation statutes might be designed to prevent four types of individuals from voting in party primaries: (I) voters generally affiliated with another party but wishing to cross over to a rival party's primary to support a

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1. Developments in the Law-Elections, 88 Harv. L. Rev. 1111, 1163 (1975) (hereinafter Developments); Note, Primary Elections: The Real Party in Interest, 27 Rutgers L. Rev. 298 (1974) (hereinafter Primary Elections).

2. N.J.S.A. 19:23-45, the enactment here under attack, formerly provided that a voter who wished to change his political affiliation must abstain from voting in two consecutive primary elections. In Nagler v. Styles, 343 F. Supp. 415 (D.N.J. 1972) (3-judge court), this requirement was held unconstitutional and N.J.S.A. 19:23-45 was stricken. Another statute directed to this subject did not take effect until December 12, 1975, L. 1975 c. 260. Thus from May 26, 1972, the date of the Nagler decision, until December 12, 1975, the effective date of the last mentioned statute, New Jersey had an "open" or unregulated primary election system and in fact was classified as an "open" primary state. Developments, supra at 1163, n.65, 1170, n. 90.

3. This Court's opinion in Stevenson v. Gilfert, supra, contains a concise history of primary election legislation in New Jersey. To the authorities to which Justice Jacobs' opinion makes reference may now be added McCormick, The History of Voting in New Jersey-A Study of the Development of Election Machinery (1664-1911) 189 et seq. (1953).

weak candidate who is likely to lose in the general election to the nominee of the voters' preferred party (raiders); (2) voters generally affiliating with another party but wishing to cross over to support their preferred primary candidate in case the nominee of the voters' own party loses the general election (second choice supporters); (3) voters generally affiliating with another party but wishing to cross over to support a candidate preferred over any potential nominee of the voters' own party (crossovers); (4) voters generally not affiliating with any party but wishing to support a particular party candidate (independents). (Developments, supra, 88 Harv. L. Rev. at 1164)

In order the more effectively to exclude such classes of persons, well over half the states "condition primary voting on party affiliation of a certain duration." Developments at 1169-70. As we have seen, in New Jersey the period is now 50 days. N.J.S.A. 19:23-45.

Plaintiff asserts that this statute is unconstitutional. The argument may be summarized as follows: The foregoing statutory provision requires, in all but the excepted cases, that a declaration of affiliation with a particular party be filed 50 days preceding the primary election. Another section of the Election Law, N.J.S.A. 19:23-14, stipulates that nominating petitions may be filed with designated public officials up to and including the fortieth day prior to the primary election. Thus, the argument concludes, a prospective voter is required to file a declaration of affiliation before he or she can know with certainty who all of the candidates for

office may be. It is contended that this offends both Federal and State Constitutions in that it impairs a citizen's right to vote.

In Rosario v. Rockefeller, 410 U.S. 752, 36 L. Ed. 2d 1, 93 S. Ct. 1245 (1973), the Supreme Court sustained a New York statute that conditioned an individual's right to vote in a particular party's primary on his having declared an affiliation with that party eight to eleven months before the date of the primary election. The Court found the state interest in preventing raiding sufficient to justify the exclusion. Raiding occurs when members of one party vote in the primary election of the other party with the intention of nominating a weak candidate who could probably be defeated by the candidate of their true party in the general election. Obviously, raiding will tend to weaken the political party attacked and if successful will result in a fraudulent candidacy.

(A) candidacy determined by the votes of non-party members...is, in practical effect, a fraudulent candidacy. (Rosario v. Rockefeller, 458 F. 2d 649, 652 (2d Cir. 1972), aff'd 410 U.S. 752, 36 L. Ed. 2d 1, 93 S. Ct. 1245 (1973))

Among other points raised by the plaintiffs in Rosario was the issue before us here--that the statutory scheme required "party enrollment before prospective voters had knowledge of the candidates or issues to be involved in the next primary election." 410 U.S. at 760, 36 L. Ed. 2d at 8, 93 S. Ct. at 1251. The Court apparently felt no need to address this point.

Following this unsuccessful challenge to New York's primary election system, certain aspects of Connecticut's primary system were challeng-

ed in Nader v. Schaffer, 417 F. Supp. 837 (D. Conn. 1976) (3-judge court). The attack was upon a statutory provision which required an individual to register as a member of a particular party before voting in that party's primary election. In the course of his opinion sustaining the legislation, Circuit Judge Anderson emphasized two important interests which a closed primary seeks to protect. It was noted that the associational rights of the party's membership are shielded from intrusion by those with adverse political principles and aims, and furthermore, that

> a state has a more general, but equally legitimate, interest in protecting the overall integrity of the historic electoral process. This includes preserving parties as viable and identifiable interest groups; insuring that the results of primary elections, in a broad sense, accurately reflect the voting of party members. Parties should be able to avoid primary election outcomes which will confuse or mislead the general electorate to the extent it relies on party labels as representative of certain ideologies; and preventing fraudulent and deceptive conduct which mars the nominating process. (417 F. Supp. 837, 845)

The court went on to say,

> As we have noted, the phrase "preservation of the integrity of the electoral process" contemplates, in the nominating context, the assurance that primary election results reflect the will of party members, undistorted by the votes of those unconcerned with, if not

> actually hostile to, the principles, philosophies, and goals of the party. The phrase contemplates the prevention of fraud in the nominating process, and a candidacy determined by the votes of non-party members is arguably a fraudulent candidacy. See Rosario v. Rockefeller, 458 F. 2d 649, 652 (2 Cir. 1972), aff'd. 410 U.S. 752, 93 S. Ct. 1245, 36 L. Ed. 2d 1 (1973). (Id. at 846-47)

The decision was affirmed by the Supreme Court. 429 U.S. 989, 50 L. Ed. 2d 602, 97 S. Ct. 516 (1976).

Rosario and Nader make it abundantly clear that the New Jersey statute under attack suffers from no federal constitutional infirmity.

Before proceeding to plaintiff's state constitutional claim, let us first point out that had she fulfilled the durational affiliation requirement and registered 50 days or more before the election, she could have voted. But at that time, she points out, she might not have known who all of the candidates were to be, because someone might qualify as a nominee during the ensuing ten-day period. Since the plaintiff has failed to demonstrate that such an event actually occurred, we find this alleged imperfection in the primary election procedure to be deminimis and insufficient to overcome the self-inflicted character of her so-called "disenfranchisement." Only because the matter is of some public consequence, do we proceed to the substantive aspects of her contention.

In Worden v. Mercer County Bd. of Elections, 61 N.J. 325 (1972), we held that college students who were bona fide residents of their college communities could not be

denied the right to vote in local elections. We viewed the Supreme Court's decisions in Reynolds v. Sims, 377 U.S. 533, 12 L. Ed. 2d 506, 84 S. Ct. 1362 (1964) and Dunn v. Blumstein, 405 U.S. 330, 31 L. Ed. 2d 274, 92 S. Ct. 995 (1972) as requiring that a denial of the right to vote be justified by a compelling state interest. Convinced of the soundness of the federal approach, we announced that, as a matter of state constitutional law, a showing of the same magnitude would be required in order to justify any restriction on the franchise as guaranteed by Art. II, §3 of the New Jersey Constitution. That test, however, is inappropriate in this case. As will be amply demonstrated, it is inaccurate to say that a person such as the plaintiff, who is registered as amember of one political party and who desires to participate in the primary election of another party, has been denied the right to vote.

The State constitutional right to vote, secured by Article II, §3 of the New Jersey Constitution, consists of the following:

> (a) Every citizen of the United States, of the age of 18 years, who shall have been a resident of this State and of the county in which he claims his vote 30 days, next before the election, shall be entitled to vote for all officers that now are or hereafter may be elective by the people, and upon all questions which may be submitted to a vote of the people;

Unlike the plaintiff and our dissenting colleagues, we fail to see how the entitlement "to vote for all officers that now are or hereafter may be elective by the people" could possibly

be read as encompassing the right to participate in a particular party's candidate selection process. The right to vote, as guaranteed by the plain language of our State Constitution, does not subsume an unfettered right to be involved in a party's internal decision-making process, which is all that a primary election is. In this state, the right to participate in a political party's primary election is a statutory one.

When a state statute is challenged on state constitutional grounds, the nature of state government and the distribution of sovereign power within it make the plaintiff's burden a heavy one. "Unlike the Federal Constitution, the State Constitution is not a grant by a limitation of powers." Gangemi v. Berry, 25 N. J. 1, 7 (1957). The federal government possessess only those powers ceded to it by the states in the Federal Constitution; the states possess all other powers of government. These reserved powers of government repose in the people but are exercised by the Legislature as the representative of the people. N.J. Const., Art. 4, §1, ¶1. As such repository of these reserved powers the Legislature is free to act except (1) in respect of powers delegated to the federal government by the Constitution of the United States, and (2) as such exercise may be limited by the state constitution. There are no other restraints upon state legislative power.

> By Article IV, Section 1, paragraph 1 of the 1947 State Constitution, the people vested full sovereign authority in the Legislature, save as otherwise therein provided. Schmidt v. Board of Adjustment, Newark, 9 N.J. 405 (1952). The theory of our political system is

that the ultimate sovereignty is in the people, "from whom springs all legitimate authority" and (1) the legislative authority in the States consists of "the full and complete power as it rests in, and may be exercised by, the sovereign power of any country, subject only to such restrictions as they may have seen fit to impose, and to the limitations which are contained in the Constitution of the United States," and the legislative department "is not made a special agency for the exercise of specifically defined legislative powers, but is intrusted with the general authority to make laws at discretion"...(Gangemi v. Berry, supra, 25 N.J. at 8-9)

Because of the vast expanse of governmental power reposing in the legislature, one challenging a state statute, on other than federal constitutional grounds, indeed bears a heavy burden. The established test for unconstitutionality under the state constitution is a rigorous one.

> A constitutional prohibition against the exercise of a particular power is in the nature of an exception; and it is the settled rule of judicial policy in this jurisdiction that a legislative enactment will not be declared void unless its repugnancy to the constitution is so manifest as to leave no room for reasonable doubt. The constitutional limitation upon the exercise of legislative power must be clear and imperative. This is a well defined limitation engrafted upon the function assumed by the courts, federal and

> state, to nullify a statute for unconstitutionality. State Board of Milk Control v. Newark Milk Co., 118 N.J. Eq. 504; Attorney-General v. McGuinness, 78 N.J.L. 346, 369; Sexton v. Newark District Telegraph Co., 84 Id. 85; affirmed, 86 Id. 701; Bott v. Secretary of State, 63 Id. 289, 302. See, also, Marbury v. Madison, 1 Cranch 137; 2 L. Ed. 60. There is to be no forced or unnatural construction. Such constitutional limitation upon the general legislative power "is to be established and defined by words that are found written in that instrument, and not by reference to some spirit that is supposed to pervade it or to underlie it or to overshadow the purposes and provisions expressed in its written language." State v. DeLorenzo, 81 N.J.L. 613. See, also, Sturges v. Crowninshield, 4 Wheat. 122; 4 L. Ed. 529. (State v. Murzda, 116 N.J.L. 219, 223 (E. & A. 1935))

In Gangemi v. Berry, supra, Justice Heher quoted at some length from an opinion of the Supreme Court of South Dakota. It is so apt and accurate that we repeat part of it here.

> "(The people), in framing the constitution, committed to the legislature the whole lawmaking power of the state, which they did not expressly or impliedly withhold. Plenary power in the legislature for all purposes of civil government is the rule. A prohibition to exercise a particular power is an exception. In inquiring, therefore, whether a given statute is constitutional, it is for those who question its validity to show that it is forbidden." People ex rel. Wood v.

Draper, 15 N.Y. 532, 543 (App. Ct. 1857), Denio, Ch. J. The American legislatures "have the same unlimited power in regard to legislation which resides in the British parliament, except where they are restrained by written constitutions. That must be conceded, I think, to be a fundamental principle in the political organizations of the American states. We cannot well comprehend how, upon principle, it should be otherwise. The people must of course, possess all legislative power originally. They have committed this in the most general and unlimited manner to the several state legislatures, saving only such restrictions as are imposed by the constitution of the United States, or of the particular state in question." Thorpe v. Rutland and Burlington Railroad Co., 27 Vt. 140 (Sup. Ct. 1854), Redfield, Ch. J. (25 N.J. at 9-10 (quoting from State ex rel. Richards v. Whisman, 36 S.D. 260, 154 N.W. 707 (1915)[4]

A full awareness of the vast scope of state legislative power must be kept constantly in mind in considering any challenge to an enactment where the contention does not rest on Federal constitutional grounds. Absent such grounds, the prohibition against the questioned act must be clearly set forth in the state constitution. We fail to

4. That American state legislatures "have the same unlimited power in regard to legislation which resides in the British parliament except where they are restrained by written constitutions," should not be treated lightly. See A. Dicey, The Law of the Constitution 40-41 (6th ed. 1902) (" 'It is a fundamental principle with English lawyers, that Parliament can do everything but make a woman a man, and a man a woman.' ").

find any such prohibition denying to the Legislature the right to pass this statute. The most that may be said of New Jersey's closed primary system is that it subjects an individual's right to vote in political party elections to certain restrictions. In light of the foregoing discussion, in order for the plaintiff to succeed, she must demonstrate that the state interests sought to be fostered by the Primary Election Law are insufficient to warrant these restrictions.

As was indicated in Nader v. Schaffer, supra, there are at least two significant interests that are protected by a closed primary election system with a durational affiliation requirement. First, such a system supports the associational rights of regular party members.

"Association" is a constitutional term of art which describes the formation and perpetuation of collectivities for the purpose of advancing goals and beliefs and of expressing attitudes and philosophies. (Primary Elections at 302)

If a political party, which is such an association, must admit any and all who wish to vote in its primary election, there would then most certainly ensue an erosion in the cohesive partisanship that is basic to the party's strength. A political primary election is something other than a purely public event insofar as it affords an opportunity to adherents of some political philosophy to advance their goals, proselytize their beliefs and seek to acquire or perpetuate their power. These interests -- and

others as well -- are the associational values which state legislation may properly protect.

> If the courts successfully open the nominating process to all voters without regard to party affiliation the price may well be the decline of strong competitive parties. (Note, The Right to Vote and Restrictions on Crossover Primaries, 40 U. Chi. L. Rev. 636, 658 (1973))

Secondly, as we have already mentioned, the state has a strong public interest in maintaining the integrity of the electoral process. This is significantly fostered by legislation designed to prevent "raiding." It has been recognized that "raiders...will not want to foreclose their opportunity to vote in their own party's primary until the outcome is fairly certain. Crossovers and independents will not wish to commit themselves to one party until the candidates are clearly identified." Developments, supra, 88 Harv. L. Rev. at 1169. As Judge Kentz observed when the issue now before us was presented to the Law Division in Friedland v. State, 149 N.J. Super. 483 (Law Div. 1977):

> Plaintiffs urge this court to strike down or amend the declaration requirement so that affiliation be required only after the filing of primary candidate petitions, which occurs 40 days before the primary election. This argument ignores the principal purposes of the restriction, that is, to commit voters to party philosophies at a cut-off point that effectively minimizes opportunities for "raiding." The

> State has a legitimate interest in "preserving parties as viable and identifiable interest groups; insuring that the results of primary elections, in a broad sense, accurately reflect the voting of party members." Nader, supra. (149 N.J. Super. at 493)

We entirely concur with this statement.

Against the State's interest in the integrity of the electoral process and the associational rights of political parties must be weighed the harm that is done to an individual who allegedly is denied the right to vote in a primary election. We are persuaded, as was the Supreme Court in Rosario v. Rockefeller, supra, that these interests are substantial enough to justify the modest restriction which have been placed on what the plaintiff contends should be an individual's unfettered right to participate in a party primary.

Plaintiff's position is essentially a reflection of a point of view--said to be widely held--that voters are more interested in candidates than in parties. Whether or not this is so we do not know. Suffice it to say that the two-party system, including a closed primary with durational affiliation requirements such as we have in New Jersey, characterizes the governments of most states. If it is to be changed, the change must come from the legislature or from the people. It cannot come from the courts.

The judgment of the Appellate Division is affirmed.

SUPREME COURT OF NEW JERSEY
A-15 September Term 1978

MURIEL S. SMITH,

Plaintiff-Appellant,

v.

ROSE PENTA, Judge of Board of Elections, District One, Borough of Highlands; ALYNN TRACY HECK, Superintendent of Elections, County of Monmouth, State of New Jersey; ANN FLYNN, Monmouth County Board of Elections; STATE OF NEW JERSEY,

Defendants-Respondents.

PASHMAN, J., dissenting.

I respectfully dissent. Under present law, those who wish to vote in a political primary cannot obtain a complete list of candidates until 34 days before the election. See N.J.S.A. 19:23-14. Nonetheless, they are required to declare their party affiliation and thus limit the individuals for whom they can cast their ballot at least 50 days prior to the date of the primary. N.J.S.A. 19:23-45. Voters are thus deprived of the opportunity to make an informed decision as to party affiliation in light of the available candidates.

This system is apparently permissible under the federal constitution, see Rosario v. Rockefeller, 410 U.S. 752, 36 L. Ed. 2d 1, 93 S. Ct. 1245 (1973). It is well established, however, that we are entirely free to interpret the provisions of our State Constitution so as to provide greater protection of individual rights than that offered by its federal counterpart. See, e.g., State v. Slockbower, 79 N.J. 1 (1979); So. Burlington Cty. NAACP v. Tp. of Mt. Laurel, 67 N.J. 151 (1975); Robinson v. Cahill, 62 N.J. 473 (1973). In my view, the statutory scheme here at issue is violative of N.J. Const. (1947), Art. II, par. 3.[1]

I

Preliminarily, I feel constrained to comment upon the majority's intimation that a plaintiff must bear a heavier burden in order to overturn a statute on state constitutional grounds than to invalidate it as repugnant to the federal constitution. This conclusion on the majority's part is premised upon the fact that "the federal government possesses only those powers ceded to it by the states in the Federal Constitution; the states possess all other powers of government." See ante at (slip opinion at 12). From this undeniably true premise, however, the majority is led to conclude erroneously that state legislatures possess almost limitless

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Art. II, par. 3 provides in pertinent part:
(a) Every citizen of the United States, of the age of 18 years, who shall have been a resident of this State and of the county in which he claims his vote 30 days, next before the election, shall be entitled to vote for all officers that now are or hereafter may be elective by the people, and upon all questions which may be submitted to a vote of the people * * *.

ability to enact laws which do not transcend the federal constitution.

The fallacy in the majority's argument is easily perceived. The Tenth Amendment to the United States Constitution provides that those powers not delegated to the federal government are reserved to the states. It does not repose these powers in state legislatures. Rather, states remain free to distribute these powers as they see fit among the executive and legislative branches of government, or not to allow either entity to exercise them.[2]

In this state, the people - through the adoption of the 1947 Constitution - have determined that the ability of the legislature to enact various types of laws shall be limited. One such limitation - the one relied upon by plaintiff - is contained in Art. II, par. 3 (supra at 2, fn. 1). If the statutory scheme here at issue has violated this constitutional provision, that statutory scheme must fall. And this is so, regardless of whether a violation of the federal constitution has occurred.

It therefore makes no sense to say that a plaintiff must bear a heavier burden in order to overturn a statute on state constitutional grounds than to invalidate it as repugnant to the federal constitution. Whether a law is challenged on state or federal constitutional grounds, the plaintiff bears the same burden. In order to prevail, all he need do is demonstrate that in enacting that law, the Legislature has exceeded

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2 In fact, it should be noted that our own Constitution provides that "(a)ll political power is inherent in the people* * *." N.J. Const. (1947), Art. I, par. 2.

the limits imposed by a particular constitutional provision.

The majority's conclusion to the contrary represents a serious departure from precedent. We have not hesitated in the past to strike down legislation that has contravened our state constitution, regardless of its validity under federal law. See, e.g., State v. Baker, N.J. (1979); State v. Celmer, N.J. (1979); State v. Saunders, 75 N.J. 200 (1977); Robinson v. Cahill (I through V), 62 N.J. 473, cert. den. sub nom., Dickey v. Robinson, 414 U.S. 976 (1973); 63 N.J. 196, cert. den. sub nom., Dickey v. Robinson, 414 U.S. 976 (1973); 69 N.J. 133 (1975); 70 N.J. 155 (1976); 70 N.J. 464 (1976); Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481 (1977); So. Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, app. dism. and cert. den., 46 L. Ed. 2d 28 (1975); Vreeland v. Byrne, 72 N.J. 292 (1977). Cf. State v. Tropea, 78 N.J. 309 (1978); Bor. of Neptune City v. Bor. of Avon-by-the-Sea, 61 N.J. 296 (1972). See generally, Brennan, "State Constitutions and the Protection of Individual Rights," 90 Harv. L. Rev. 489 (1977).

II

The franchise is one of our most fundamental and cherished rights. This Court has proclaimed the vote to be the "keystone of a truly democratic society." Gangemi v. Rosengrad, 44 N.J. 166, 170 (1965). Other rights, "even the most basic, are illusory if the right to vote is undermined." Wesberry v. Sanders, 376 U.S. 1, 17, 11 L. Ed. 2d 481, 492 (1964). Moreover,

this right is equally applicable to both general elections and political primaries. See, e.g., Quaremba v. Allan, 67 N.J. 1, 11 (1975); Bullock v. Carter, 405 U.S. 134, 146-147, 31 L. Ed. 2d 92, 101-102 (1972); Gray v. Sanders, 372 U.S. 368, 9 L. Ed. 2d 821 (1963); Terry v. Adams, 345 U.S. 461, 97 L. Ed. 1152 (1953); Echevarria v. Carey, 402 F. Supp. 183 (1975), aff'd, 538 F. 2d 309 (2d Cir.), vacated and remanded for mootness, 429 U.S. 808 (1976); Friedland v. State, 149 N.J. Super. 483, 490 (Law Div. 1977). The majority's suggestion that primary matters are not protected by N.J. Const. (1947) Art. II, par. 3 is surprising in light of this Court's holdings in Quaremba v. Allan, supra, and Stevenson v. Gilfert, 13 N.J. 496, 503, 506 (1953).

The right to vote does not encompass merely the ability to cast a ballot. That right "would be empty indeed if it did not include the right of choice for whom to vote." Gangemi v. Rosengard, supra, 44 N.J. at 170; see Quaremba v. Allan, supra, 67 N.J. at 11; Sadloch v. Allan, 25 N.J. 118 (1957); Reynolds v. Sims, 377 U.S. 533, 555, 12 L. Ed. 2d 506, 523 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."). Without the option to choose, the vote itself is devoid of practical significance. It is with respect to this freedom that the current statutory scheme unnecessarily infringes upon the exercise of the franchise.

As previously noted, persons interested in voting in a political primary must, with certain

exceptions not here relevant, declare their party affiliation before they are able to ascertain the complete list of those running for office. Once having declared their affiliation, they may not change it in light of a new candidacy announced after the 50-day deadline. Thus, a voter may be precluded from supporting the primary candidate of his choice.[3] And, unless that candidate wins the primary election, the voter will never have the opportunity to cast his ballot for the preferred officer-seeker. The 50-day deadline therefore results in a serious incursion upon the voting rights of our citizenry.

Because of the critical importance of the vote to the functioning of our society, in order not to transcend constitutional bounds, substantial restrictions upon its exercise must be necessary to promote a compelling governmental interest. See, e.g., Dunn v. Blumstein, 405 U.S. 330, 342, 31 L. Ed. 2d 274, 284 (1972); Echevarria v. Carey, supra, 402 F. Supp. at 187; Wurtzel v. Falcey, 69 N.J. 401, 403 (1976); Worden v. Mercer County Bd. of Elections, 61 N.J. 325, 346 (1972). That is, such restrictions must both serve a paramount governmental goal and impinge upon the franchise to a lesser extent than any other feasible means of attaining that goal.

The majority identifies two State interests which it concludes justify the present restriction

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3 The majority points out that in this case no candidate actually filed after the 50-day affiliation deadline. Although this is correct, it is irrelevant to the legal analysis involved. The gravaman of plaintiff's complaint is that she could not intelligently choose a party without being certain of the complete list of candidates. Her quandary was in no way affected by occurrences -- or non-occurrences -- which took place after the deadline had passed.

upon voter freedom. First, it asserts that the "integrity of the electoral process" is preserved in that "raiding" is deterred. Second, it emphasizes that the present scheme enables political parties to maintain their distinct and separate identities and ideologies. To this list might be added a concern for administrative efficiency. Although I agree that all three of these goals are legitimate, nevertheless I am convinced that each could be adequately effectuated by less restrictive measures. Consequently, the present statutory scheme violates the imperative of voter freedom and must be stricken.

The most frequently offered justification for durational affiliation requirements is the deterrence of "raiding" -- that is, the practice of registering for the primary election of a rival party for the purpose of nomination a weak candidate likely to lose in general election. At the outset, it should be noted that the majority's concern with the frequency of "raiding" appears to be more a product of judicial imagination than reality. See "Developments in the Law-Elections," 88 Harv. L. Rev. 1111, 1173 (1975) (noting that evidence suggests that the likelihood of "raiding" is overstated). A large number of our sister states have "open" or "blanket" primaries in which citizens may vote in either or both of the primaries. Id. at 1163 n. 65. Several other states require declarations of affiliation but allow them to be made up to and including the date of the election. Id. at 1164, 1164 n.66. Surely their experience believes any contention that lengthy deadlines are necessary to prevent "raiding."

Thus, a shorter deadline - one which would allow voters to know the candidates before opting for a party - would adequately further the State's speculative interest in deterring any "raiding" that might otherwise occur.

The State's concern with preserving party identity can similarly be assured through less severe restrictions. Political parties are not, and probably never were, tightly knit, static organizations of ideologically identical individuals. Rather, as Justice Powell has noted, they "have been characterized by a fluidity and overlap of philosophy and membership." Rosario v. Rockefeller, supra, 410 U.S. at 769, 36 L. Ed. 2d at 14 (Powell, J., dissenting). Citizens "customarily choose a party and vote in its primary simply because it presents candidates and issues more responsive to their immediate concerns and aspirations." Id.[4]

Even assuming, however, that the affiliation requirements are of some aid in the preservation of party identity, it is difficult to accept the proposition that a 30-day deadline, for example, would less fully protect that interest than the present 50-day limitation. A 30-day filing requirement, moreover, would not preclude a voter from making an informed choice as to party affiliation in light of available candidates. It thus represents a more reasonable method of achieving the State's legitimate goal.

The majority does not attempt to support the

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4 The majority states that plaintiff's case is bottomed on the belief "that voters are more interested in candidates than in parties." See ante at (slip opinion at 19). This clearly overstates the case. Instead, plaintiff's claim is based upon the undeniably true conclusion that some people will be desirous of changing their affiliation in light of a particular candidate who raises new issues or takes a new stance on old issues.

present registration scheme on grounds of administrative efficiency. Yet, it is clear that the mechanics of processing party registrations would justify the imposition of a reasonable deadline for submitting a declaration of affiliation. However, a 30-day limitation would appear more than adequate to satisfy this need.

For the foregoing reasons, I conclude that the State interests here involved are insufficient to outweigh the significant incursion upon the right of our citizens to vote for candidates of their own unfettered choosing. Voters should not be precluded from altering their party affiliation in response to a promising candidate or an important issue. The current system, by compelling voters to make an uninformed choice as to party membership, severely curtails that freedom. It thereby impermissibly burdens the right to exercise the franchise and hence violates N.J. Const. (1947), Art. II, par. 3.

Although the 50-day durational affiliation requirement, as it presently stands, contravenes the State Constitution, nevertheless it could be argued that it is not necessary to invalidate the statutory registration scheme in toto. Rather, it might be possible - as an interim measure pending legislative action - for us to reduce the deadline to 30 days before the election. In this way the interests of both the State and the voters would be reasonably effectuated and our citizens would be able to exercise their franchise in a more informed and effective manner. Inasmuch as the majority has concluded that the statutory scheme is wholly constitutional, it is not necessary to consider the merits of such a proposal.

Accordingly, I would reverse the judgment of the Appellate Division and hold that N.J.S.A. 19:23-45 is unconstitutional.

Justice Sullivan joins in this dissenting opinion.

WILLIAM E. WILSON
107 Bay Avenue
Highlands, New Jersey 07732
(201)291-5500
Attorney for Plaintiff

SUPERIOR COURT
OF NEW JERSEY
LAW DIVISION
MONMOUTH COUNTY
Docket No. L39830-76E

MURIEL S. SMITH

Plaintiff,

vs:

ROSE PENTA, Judge of Board of Elections, District One, Borough of Highlands; ALLYN TRACY HECK, Superintendent of Elections, County of Monmouth, State of New Jersey; ANN FLYNN, Monmouth County, Board of Elections; STATE OF NEW JERSEY,

Defendants.

Civil Action

COMPLAINT

Plaintiff, Muriel S. Smith, who resides at 135 Highland Avenue, Highlands, New Jersey, for herself and for all voters similarly situated in the Borough of Highlands, and for all voters similarly situated in the County of Monmouth, and for all voters similarly situated in the State of New Jersey who have been denied the right to vote in a primary by reason of their failure to file a declaration that he or she desires to vote in the primary election of another political party pursuant to N.J.S.A. 19:23-45, by way of Complaint, says:

1. The statute in question N.J.S.A. 19:23-45

requires that said declaration be filed at least fifty days before the primary.

2. N.J.S.A. 19:23-45 Bill 1854 signed May 20, 1977 and its supplements gives relief to newly registered voters and voters at a first primary at which he is an eligible voter, to vote in primary by making a declaration at the polls.

3. N.J.S.A. 19:13-16 and N.J.S.A. 19:23-14 require that candidates need not file nominating petitions until forty days before primary.

4. Plaintiff is a registered voter in the Republican Party in District 1 in the Borough of Highlands, County of Monmouth, State of New Jersey.

5. Plaintiff did not file the appropriate declaration that she desired to vote in the primary election of another political party prior to or on the fiftieth day next preceding the day of the primary election.

6. Plaintiff did not make this declaration because all of the candidates for the primary on the local, county and state levels had not declared their candidacy and plaintiff and others similarly situated were therefore denied the right to make a choice as to which party, candidate or candidates they wished to support and vote for the primary election.

7. On June7, 1977, primary election day, plaintiff attempted to vote as a democrat at the local polling place for District 1 in the Borough of Highlands and was refused the right to vote in the Democratic primary being told that she had not filed a declaration of intention to vote in another political party at least fifty days before the primary.

8. Plaintiff feels that others throughout the

municipality, county and state, are being denied the right to vote on similar grounds.

9. Plaintiff feels that this is a denial of her constitutional right to vote and denial of the rights of others similarly situated which right is guaranteed under Article II Section 3 of the Constitution of the United States of America; and of the Constitution of the State of New Jersey and further that she and others in a similar situation are being discriminated against contrary to state and federal laws wherein N.J.S.A. 19:23-45 permits newly registered voters the right to vote at a primary election without first making a party declaration thereby giving to them the benefit of knowing the candidates of a particular party prior to the making of a declaration of party - a right which is not afforded plaintiff or others similarly situated.

WHEREFORE, plaintiff, for herself individually and for other voters similarly situated in the Borough of Highlands, and in the County of Monmouth, and in the State of New Jersey, demand judgment of the Court ordering:

A. That the defendant be directed that the polls remain open to permit Muriel S. Smith and others similarly situated to register to vote in the primary of their choice and to vote in the primaries of their choice regardless of party affiliation.

B. That the defendants be enjoined for proceeding with or closing the election process until plaintiff, Muriel S. Smith, and other similarly situated have been given the right to vote in the primary of their choice regardless of party affiliation.

C. That the statutory provisions in question N.J.S.A. 19:45 be declared unconstitutional as a violation of due process and as being discriminatory in application since it affords one class of voters a privilege denied to another class of voters, that being the right to vote in a primary by declaring at the polls.

D. That the statutory time period for declaration be shortened to a time period within 40 days in order to afford plaintiff and others similarly situated the opportunity to exercise their right to suffrage in a meaningful manner.

E. For such other relief as the Court may deem just.

WILLIAM E. WILSON
Attorney for Plaintiff

WILLIAM E. WILSON
107 Bay Avenue
Highlands, New Jersey 07732
(201)291-5500
Attorney for Plaintiff

MURIEL S. SMITH,

Plaintiff,

vs:

ROSE PENTA, et als.

Defendants.

SUPERIOR COURT
OF NEW JERSEY
LAW DIVISION
MONMOUTH COUNTY
Docket No. L-39830-76E

Civil Action
VERIFICATION

STATE OF NEW JERSEY:
SS:
COUNTY OF MONMOUTH:

Muriel S. Smith, for herself and for all the voters similarly situated in the Borough of Highlands, for all the voters similarly situated in the County of Monmouth and for all the voters similarly situated in the State of New Jersey, and being of full age, being duly sworn according to law, on her oath says:

1. I reside at 135 Highland Avenue, Highlands, New Jersey and I am the plaintiff in the above entitled action for myself individually and as representative of a class of voters in the Borough, County and State who are similarly situated.

2. I have read the annexed complaint and

know the contents thereof and the same are true of my own personal knowledge.

MURIEL S. SMITH

SWORN and SUBSCRIBED to before
me this 7 day of June, 1977.
WILLIAM E. WILSON
Attorney at Law
State of New Jersey

SUPERIOR COURT
OF NEW JERSEY
MONMOUTH COUNTY
Docket No.

MURIEL S. SMITH,

Plaintiff,

vs:

Civil Action
ORDER DENYING ORDER
TO SHOW CAUSE

ROSE PENTA, et als.
Defendants.

THIS MATTER being opened to the Court by William E. Wilson, Esq., attorney for the plaintiff, Muriel S. Smith, for herself and for all others voters similarly situated in the Borough, County and State who have been refused the right to vote under N.J.S.A. 19:23-45 and it appearing by the duly verified complaint filed herein that all of the plaintiff and others similarly situated are proper parties to the action, and it appearing that plaintiff was in violation of N.J.S.A. 19:23-45.

IT IS on this 7th day of June, 1977,

ORDERED, that plaintiff's motion for relief is herein denied and the Complaint is dismissed.

LOUIS R. AIKINS, J.S.C.

WILLIAM E. WILSON
107 Bay Avenue
Highlands, New Jersey 07732
(201)291-5500
Attorney for Plaintiff

SUPERIOR COURT
OF NEW JERSEY
LAW DIVISION
MONMOUTH COUNTY
Docket No. L-39830-76

MURIEL S. SMITH,

Plaintiff,

vs:

Civil Action
NOTICE OF APPEAL

ROSE PENTA, et als.
Defendants.

TO:

Rose Penta, 157 Highland Avenue,
Highlands, N.J.

Richard O'Connor,
Attorney for County of Monmouth,
Monmouth County Board of Elections
and
Supt. of Elections
Monmouth County, New Jersey

Gregory E. Nagy
Deputy Attorney General
State House Annex
Trenton, New Jersey

NOTICE is hereby given that Plaintiff-Appellant, Muriel S. Smith, for herself and for all other voters in the Borough of Highlands, County of Monmouth and State of New Jersey,

hereby appeal to the Appellate Division of the Superior Court of New Jersey, from the final judgment of dismissal entered in this case, in the Superior Court of New Jersey, Law Division, by the Honorable Louis R. Aikins, J.S.C., in favor of defendants-respondants, Rose Penta, Judge of Board of Elections, District One, Borough of Highlands; Allyn Tracy Heck, Superintendent of Elections, County of Monmouth, State of New Jersey; Ann Flynn, Monmouth County Board of Elections; State of New Jersey on June 7, 1977.

WILLIAM E. WILSON
Attorney for Plaintiff-
Appellant

I hereby certify that the foregoing
is a true copy of the original
on file in my office.
Elizabeth McLaughlin
Clerk

WILLIAM E. WILSON
107 Bay Avenue
Highlands, New Jersey 07732
(201)291-5500
Attorney for Plaintiff-Appellant

SUPERIOR COURT
OF NEW JERSEY
MURIEL S. SMITH, APPELLATE DIVISION
Docket No.

Plaintiff-Appellant,

Civil Action

vs:

NOTICE OF MOTION
ROSE PENTA, et als. TO ACCELERATE
PROCEEDINGS AND
FOR EMERGENT RELIEF

TO:

TAKE NOTICE that on June 7, 1977, at 9:00 o'clock in the forenoon, or as soon thereafter as counsel may be heard, the undersigned, the attorney for the Appellant, will apply to the Appellate Division for an order providing for the acceleration of all appellate proceedings in the above captioned matter for the reason that all ballots in the election proceedings which are being contested herein must be completed by June 7, 1977.

WILLIAM E. WILSON
Attorney for Plaintiff-
Appellant

WILLIAM F. HYLAND
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Respondent
36 West State Street
Trenton, New Jersey 08625

BY: NATHAN M. EDELSTEIN
Deputy Attorney General
(609) 292-1506

SUPERIOR COURT
OF NEW JERSEY
APPELLATE DIVISION
MURIEL S. SMITH, ESSEX COUNTY
DOCKET NO.

Appellant,

-vs- Civil Action
ORDER AFFIRMING
DECISION BELOW

ROSE PENTA, et al.,

Respondents.

This matter having been opened to the Court before Panel F of the Appellate Division, on Tuesday, June 7, 1977, before Judge Larner, Judge Kole, with Judge Carton having disqualified himself, by William E. Wilson, Esquire, attorney for appellant, Muriel S. Smith, in the presence of William F. Hyland, Attorney General of the State of New Jersey (Nathan M. Edelstein, Deputy Attorney General, appearing), on an emergent basis pursuant to R. 2:9-2, on Complaint by said appellant seeking to have declared unconstitutional N.J.S.A. 19:23-45, and the Court having read and considered the

Complaint filed herein and the Order Denying Order To Show Cause; and the Court having heard and considered oral argument in this matter; and the Court being convinced that the action taken below was correct, and good cause appearing:

NOW, THEREFORE, on this 7th day of June, 1977, it is

ORDERED That N.J.S.A. 19-23-45, and all amendments thereto, are declared constitutional as rational exercises of legislative discretion; and

IT IS FURTHER ORDERED That the action taken below by Judge Aikins, be affirmed

FOR THE COURT:

Samuel A. Larner, J.A.D.

I hereby certify that the foregoing
is a true copy of the original
on file in my office.
Elizabeth McLaughlin
Clerk

SUPREME COURT OF NEW JERSEY
Docket No. A-15 September Term 1978

MURIEL S. SMITH,

Plaintiff-Appellant,

v.

ROSE PENTA, Judge of Board of Elections, District One, Borough of Highlands; ALYNN TRACY HECK, Superintendant of Elections, County of Monmouth State of New Jersey; ANN FLYNN, Monmouth County Board of Elections; STATE OF NEW JERSEY,

Defendants-Respondents.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. NOTICE is hereby given that Muriel S. Smith, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of New Jersey entered in this action on July 19, 1979 affirming the Order Denying Order To Show Cause.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

II. The Clerk of the Supreme Court of New Jersey will please prepare a copy of the record in this action for transmission to the Clerk of the Supreme Court of the United States, and

include in said record the following:

1. Complaint and Verification.
2. Order Denying Order To Show Cause dated June 7, 1977.
3. Notice of Appeal.
4. Order Affirming Decision Below of June 16, 1977.
5. Opinion of the Supreme Court dated July 16, 1979.

III. The following questions are presented on this appeal:

1. Is N.J.S.A. 19:23-45 violative of the Constitution of the United States in that it deprives the plaintiff-appellant and others similarly situated of the right to vote for the candidate or candidates of their choice?
2. Is N.J.S.A. 19:23-45 violative of the Constitution of the United States in that it creates classes of voters certain of which are permitted to vote without prior declaration of party affiliation and certain of which are not permitted to so vote?

WILSON, ARGENTIERI & MC LEOD

BY: WILLIAM E. WILSON

SUPREME COURT OF NEW JERSEY
Docket No. A-15 September Term 1978

MURIEL S. SMITH,

Plaintiff-Appellant,

v.

ROSE PENTA, Judge of Board of Elections, District One, Borough of Highlands;
ALYNN TRACY HECK, Superintendant of Elections, County of Monmouth, State of New Jersey;
ANN FLYNN Monmouth County Board of Elections, STATE OF NEW JERSEY,

Defendants-Respondents.

PROOF OF SERVICE

I, SUSAN M. ZINGLER, a secretary in the Office of Wilson, Argentieri and McLeod, Attorneys of record for Muriel S. Smith, Appellant herein, deposes and says:

On the 10th day of October, 1979, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on Nathan M. Edelstein, Deputy Attorney General, Attorney for the Defendants, State House Annex, Trenton, New Jersey 08625, by certified mail, return receipt requested #819109.

SUSAN M. ZINGLER

Sworn and Subscribed to before
me this 10th day of October, 1979.

ROBERT E. MC LEOD
An Attorney At Law of the State of
New Jersey

Supreme Court, U.S.
FILED
NOV 16 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979
No. 79-617

MURIEL S. SMITH,

Appellant,

vs.

ROSE PENTA, Judge of Board of Elections, District One, Borough of Highlands; ALYNN TRACY HECK, Superintendent of Elections; County of Monmouth, State of New Jersey; ANN FLYNN, Monmouth County Board of Elections; STATE OF NEW JERSEY,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF

JOHN J. DEGNAN,
Attorney General of New Jersey,
Attorney for Appellees,
State House Annex,
Trenton, New Jersey 08625

STEPHEN SKILLMAN,
Assistant Attorney General,
Of Counsel

BARBARA A. HARNED,
Deputy Attorney General,
On the Brief

N.J. Appellate Printing Co., Inc., South Plainfield, New Jersey (201) 753-0200

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ARGUMENT:

The appellant has not presented a substantial constitutional issue entitling her to appeal, because the decisions of this court firmly establish that the requirements of N.J.S.A. 19:23-45 do not disenfranchise voters nor deny equal protection of the laws 4

Conclusion 9

CASES CITED:

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402 F. Supp. 183 (S.D. N.Y. 1975), aff'd mem., 538 F.2d 309 (2d Cir. 1976), vacated and remanded on question of mootness, 429 U.S. 808 (1976) 7

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SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-617

MURIEL S. SMITH,

Appellant,

vs.

ROSE PENTA, Judge of Board of Elections, District One, Borough of Highlands; ALYNN TRACY HECK, Superintendent of Elections; County of Monmouth, State of New Jersey; ANN FLYNN, Monmouth County Board of Elections; STATE OF NEW JERSEY,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF

MOTION TO DISMISS

Pursuant to *Rule* 16(1)(b) of this Court, the Attorney General of the State of New Jersey, on behalf of appellees, hereby moves to dismiss this appeal on the grounds that it does not present a substantial federal question.

QUESTIONS PRESENTED

1. Does an individual, previously affiliated with a particular political party, have a constitutionally protected right to vote in another party's primary election without complying with the requirement of *N.J.S.A.* 19:23-45 that a new party affiliation must be declared at least 50 days prior to a primary election?

2. Does the exemption of newly registered and independent voters in *N.J.S.A.* 19:23-45 from the declaration of party affiliation imposed on previously affiliated voters constitute a legitimate and reasonable legislative classification?

COUNTER-STATEMENT OF THE CASE

On June 7, 1977 a primary election was held in New Jersey (A2).[1] On that day Ms. Smith, a registered Republican who resided in the Borough of Highlands in Monmouth County, New Jersey, attempted to register as a Democrat so as to be able to vote in the Democratic primary (A2). Plaintiff admits that she had not attempted to change her affiliation from the Republican party to the Democratic party prior to the primary election day on June 7, 1977 (A28).

Ms. Smith's attempt to vote in the Democratic primary was denied on the basis that she had not filed a declaration of intent to vote in another party's primary at least 50 days prior to the primary date (A28), as required by *N.J.S.A.* 19:23-45 (set forth in Appellant's Jurisdictional Statement at 2-4). On that same day, June 7, 1977, she sought judicial relief in the form of a Verified Complaint and Order to Show Cause filed in the Superior Court of New Jersey, Law Division (A27 to A33). The Order to Show Cause was denied and the complaint dismissed, and that same day the Appellate Division of the Superior Court affirmed this ruling (A33 to A38). The Supreme Court of New Jersey granted a petition for certification, 76 N.J. 235 (1978), and affirmed the ruling below. The majority decision of the Supreme Court of New Jersey found that several decisions of this Court "make it abundantly clear that the New Jersey statute under attack suffers from no federal constitutional infirmity" (A8). Indeed, the two dissenting Justices also found that "this system [of declaring party affiliation] is apparently permissible under the federal constitution" and based their dissent on an allegedly "greater protection" afforded by the New Jersey State Constitution (A18).

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1. This notation refers to the appellant's appendix filed with her jurisdictional statement.

ARGUMENT

The appellant has not presented a substantial constitutional issue entitling her to appeal, because the decisions of this court firmly establish that the requirements of *N.J.S.A.* 19:23-45 do not disenfranchise voters nor deny equal protection of the laws.

The validity of state statutes, such as *N.J.S.A.* 19:23-45, which provide for a closed system of primary elections, has been clearly established in several decisions of this Court. Plaintiff raises no new issues of substance to distinguish her case from the cases upholding similar statutes, and therefore her appeal should be dismissed.

In *Rosario v. Rockefeller*, 410 U.S. 752 (1973), petitioners attacked the constitutionality of a New York statute which required a voter to enroll in the party of his choice at least 30 days before the general election in November in order to vote in the next subsequent party primary. The effect of this statute was to establish a cutoff date for enrollment approximately eight months prior to a presidential primary and 11 months prior to a nonpresidential primary. 410 U.S. at 760. In upholding the constitutionality of the New York statute, the Court rejected the petitioners' argument that the statute unconstitutionally disenfranchised them. *Id.* at 756-759. The Court reasoned that New York's statute "did not absolutely disenfranchise the class to which the petitioners belong" but "[r]ather . . . merely imposed a time deadline on the enrollment." *Id.* at 757. Imposition of such a deadline was held constitutional since it furthered the "legitimate and valid state goal" of "preserv[ing] the integrity of the electoral process" by preventing party "raiding." *Id.* at 760-762. Cases in which an unconstitutional disenfranchisement had been found were distinguished on the basis that under the statutes in those

cases "there was no way in which the members of [a particular] class could have made themselves eligible to vote." *Id.* In contrast, under the New York statute, the individual had only to register prior to the cutoff date in order to vote and, consequently, any disenfranchisement that occurred was self-inflicted. *Id.* at 758.

As in *Rosario*, the New Jersey statute at issue does not constitute a denial of the electoral franchise but merely a "time deadline" on enrollment which is completely within the control of a voter to satisfy. Neither does the New Jersey statute suffer from the infirmity of the Illinois statute struck down in *Kusper v. Pontikes*, 414 U.S. 51 (1973), which "locked" voters into a pre-existing party affiliation by preventing them from voting in a party's primary if they had voted in another party's primary within the preceding 23 months. 414 U.S. at 60. The only way available for Illinois voters to change their party allegiance was to forego voting in any primary for almost two years. *Id.* In contrast the New Jersey statute, like the New York statute upheld in *Rosario*, does not "lock" voters into any party since, as in *Rosario*, a New Jersey voter "may, if he wishes, vote in a different party primary each year," by the simple expedient of declaring his party affiliation 50 days prior to the primary election. 410 U.S. at 759.

Clearly, a time deadline such as provided in *N.J.S.A.* 19:23-45 does not constitute an unconstitutional infringement on voters' rights. Surely if cutoff dates of eight and 11 months are constitutional, as the Court held in *Rosario*, the much shorter cutoff date of 50 days provided in the New Jersey statute must be upheld. See also *Nader v. Schaffer*, 417 F. Supp. 837, 842, 847 (D. Conn. 1976), *aff'd mem.*, 429 U.S. 989 (1976) (six month waiting period for previously enrolled voters found reasonable).

Plaintiff attempts to avoid the holding of *Rosario* by arguing that the 50-day cutoff is unconstitutional since *N.J.S.A.* 19:23-14 permits prospective primary candidates to file their petitions up to 40 days prior to the primary date. Consequently, she argues that she is forced to declare her party affiliation before she knows who all the candidates are, thereby being deprived of her right to "intelligently" decide which party and candidate she wishes to support. However, the identical argument was rejected in *Rosario* in which the Court said that New York's delayed enrollment scheme was "not an arbitrary time limit unconnected to any important state goal" but rather accomplished "a legitimate and valid state goal" of "preserv[ing] . . . the integrity of the electoral process." *Id.* at 760-761. The integrity of the electoral process is preserved under such statutes by inhibiting party "raiding" in which sympathizers of one party vote in another's primary for a weak candidate. *Id.* Therefore, plaintiff's contention that she cannot constitutionally be required to declare her party affiliation before all possible candidacies have been announced [2] is patently frivolous in light of the recognized and legitimate purpose of the statute in preventing "raiding".

Appellant's second contention that the statute violates equal protection by exempting independent and newly registered voters is equally without substance. The residency qualification for New Jersey voters is 30 days in both the State and resident county. *N.J.S.A.* 19:31-5. New

2. It should be noted that the Supreme Court of New Jersey found that appellant "had failed to demonstrate" that any candidates filed their petitions after the date on which she was required to declare her party affiliation and therefore, the "alleged imperfection in the primary election procedure [was] deminimis and insufficient to overcome the self-inflicted character of her so-called 'disenfranchisement'" (A8).

residents who meet the 30-day durational residency requirement could be disenfranchised from the primary election if they have not established residency on or before the 50th day prior to the primary. Thus, unlike voters in plaintiff's situation, newly registered voters could, if included in the ambit of *N.J.S.A.* 19:23-45, be barred from voting without any "way in which . . . [to make] themselves eligible to vote." *Rosario v. Rockefeller, supra,* 410 U.S. at 757. Such a bar on newly registered voters in the New York statute was held unconstitutional in *Echevarria v. Carey,* 402 F. Supp. 183, 188 (S.D. N.Y. 1975), *aff'd mem.,* 538 F.2d 309 (2d Cir. 1976), vacated and remanded on question of mootness, 429 U.S. 808 (1976).[3] In *Echevarria* the district court found that the bar served no compelling state interest since "it is unrealistic to assume that many out-of-state persons will undertake the expense and suffer the inconvenience of moving to and establishing residency in New York simply so that they may raid a party's primary election." 402 F. Supp. at 188. The exemption of newly registered voters from *N.J.S.A.* 19:23-45 is thus clearly a legitimate legislative determination and not a violation of equal protection.

Neither does the exemption of independent voters raise a substantial equal protection question. Although the New York statute upheld in *Rosario* did not exempt independent voters, 410 U.S. at 754 n.3., the Connecticut statute upheld in *Nader v. Schaffer, supra,* distinguished between independents and previously enrolled voters by establishing a waiting period for independents of only three weeks as compared to the waiting period for previously enrolled voters of six months, 417 F. Supp. at 847.

3. This issue was not decided in *Rosario* since the petitioners in that case were not within the class of newly arrived voters and thus lacked standing to raise the issue. 410 U.S. at 759 n.9.

As reasoned in *Nader* "the legislature has, with some logic, imposed a longer waiting period on voters previously enrolled in other parties, as they are perhaps more likely to have a hostile motivation." *Id.* Clearly, it is reasonable to conclude that voters who have recently been affiliated with another party would be more likely to "raid" a primary than those with no previous party affiliation. As noted in *Ray v. Blair*, 343 U.S. 214, 226 n.14 (1952), "[i]n facilitating the effective operation of democratic government, a state might reasonably classify voters or candidates according to party affiliations." The exemption of independent voters from *N.J.S.A.* 19:23-45 is thus clearly a legitimate legislative determination and not a violation of equal protection.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the appeal should be dismissed for lack of a substantial federal question.

Respectfully submitted,

/s/ John J. Degnan
JOHN J. DEGNAN
Attorney General of New Jersey,
Attorney for Appellees.

STEPHEN SKILLMAN,
Assistant Attorney General,
Of Counsel

BARBARA A. HARNED,
Deputy Attorney General,
On the Brief